

Does the Involvement of Global Civil Society Make International Decision-Making More Democratic? The Case of the International Criminal Court

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ABSTRACT. The negotiation and contents of the Statute for an International Criminal Court were strongly influenced by global civil society actors. After examining definitions of global civil society, this article will consider whether and why such involvement of non-governmental actors in international negotiations should be considered desirable. In particular it will assess, in the light of the ICC negotiations, to what extent global civil society democratizes international decision-making processes, considering as elements of democracy: transparency, equality and deliberation, representation and participation. While concluding that this is only very partially the case, the final section will suggest that the tortured democracy question is not the only justification for global civil society involvement in international fora. It will discuss the much overlooked and by no means unproblematic “ethical contribution” of global civil society and offer a qualified defence of more international law, with more global civil society participation, on this basis.

KEYWORDS: democracy, global governance, civil society, international law

Introduction

The Rome Statute for an International Criminal Court, which was adopted on July 17, 1998, provides for the establishment, in The Hague, of an international court that can prosecute individuals, from common soldiers to heads of state, for genocide, war crimes and crimes against humanity. The Statute can be considered as a small revolution in international law and in the conduct of international relations, for two reasons. The first reason has been the main focus of attention in the writing of legal scholars, diplomats, activists and United Nations officials: the International Criminal Court will be an important step in the on-going transition towards an international legal order that is less based on state sovereignty, and more oriented towards the protection of all citizens of the world from abuse of power. The second reason is the process which led to the adoption of this Statute, in which global civil society had an input that was almost unprecedented in international treaty negotiations, eclipsed only by its contribution to the Landmines Ban Treaty, concluded six months earlier.

Civil society, let alone global civil society, is a confusing term. As even a brief glance at the literature would show, it has many meanings. There are as many definitions of civil society, and global civil society, as there are authors—in fact there are more.¹ Nevertheless, this term is used here, rather than other current ones such as global social movements,² advocacy networks in international politics,³ or global citizen action⁴ quite intentionally to characterise the ensemble of people and organizations described in this article.

The history of the term civil society is bound up with the notion of rules to protect citizens.⁵ While this was initially a nation-based ideal, the post-world war notion of universal human rights, coupled with a thickening network of international rules directly affecting citizens, has given birth to the utopia of a global rule-bound society. This history of humanitarian law and human rights law has been much more a product of the activities of people outside government than is commonly accepted.⁶ Hence, the idea of global civil society and humanitarian and human rights law are historically connected. This connection is of obvious relevance to the influence of civil society groups on the Statute for an International Criminal Court. Elsewhere I have described in great detail the groups and individuals involved in the negotiations.⁷ In short, these comprised individuals and groups including legal associations, human rights NGOs, women's rights activists, anti-abortionists, peace and conflict-resolution groups, religious organizations and associations generally interested in global governance.

What was Achieved

The first achievement of global civil society with respect to the Statute for an International Criminal Court, is that there should be such a Statute, and a Court, at all. The idea was first

invented in civil society, and was kept alive, developed and advocated in international legal associations for 125 years.⁸ Even a few years before the adoption of the Statute, CICC coordinator Bill Pace was told by a leading expert in international affairs to “keep working on this, but don’t get your hopes up too high for it isn’t going to happen in your lifetime, or your children’s lifetime, or your grandchildren’s lifetime.”⁹ Secretary-General Kofi Annan, too, emphasised in his ceremonial speech at the adoption of the Statute that it was “an achievement which, only a few years ago, nobody would have thought possible.”¹⁰

In terms of the content of the Statute, undoubtedly the most important achievement was the prosecutor’s authority to choose his own cases. By the admission of the key diplomats involved, this could not have been achieved without sustained and overwhelming NGO pressure. Beyond NGOs, the active involvement of the prosecutors of the Yugoslavia and Rwanda tribunals was another key factor in legitimising the idea of an independent prosecutor. Within a few years, global civil society succeeded, first, in persuading states that independent authority of the prosecutor was desirable, and second, in persuading them that it was achievable because they wanted it.¹¹

While the jurisdiction regime of the ICC is limited, the fact that states automatically accept the Court’s full jurisdiction for all the crimes in the Statute when they ratify it, is another achievement. It is a great advance over the “a la carte” jurisdiction regime originally proposed. Automatic jurisdiction was the consistent and unanimous position of civil society actors, and, like the prosecutor, gradually came to be accepted by states. The only provision that detracts from the achievement is a temporary loophole on war crimes, but so far this has only been taken advantage of by two states.

Largely due to the advocacy of a very large, active and expert civil society Gender Caucus, the Statute of the Court marks a great advance in the gender-sensitiveness of international law. In terms of crimes, it includes a comprehensive definition of gender-based war crimes and crimes against humanity, a gender dimension to the definition of slavery, and the inclusion of persecution on the basis of gender as a component of crimes against humanity. Other provisions include references to the gender balance and gender-specific expertise of the judges and other staff of the Court; a reference to gender in a general non-discrimination clause; and protection for and gender-sensitive treatment of victims and witnesses. On the other hand, partly due to pressure from “pro-family” groups, definitions of the term “gender” itself, and of “forced pregnancy” were forged in such a way that they should not be an obstacle to any state’s ratification of the Statute, regardless of its general gender policies.¹²

Intense pressure from civil society prevented war crimes committed in internal conflict situations from being excluded from the Statute. A special “Victims’ Rights Group” played an important role in forging rules that balance the need for fair and effective prosecutions against protection, sensitive treatment, and rights, of victims and witnesses. The “Child Rights Caucus” played a role in the criminalization of conscription of children under fifteen, a new element in humanitarian law.

Many state representatives in the ICC negotiations, including the successive chairs Bos and Kirsch, have remarked on, and praised, the strong involvement and indeed influence of global civil society in the process of negotiating the Statute for an International Criminal Court.¹³ Perhaps the strongest expression of this sentiment came from a diplomat who did not belong to the Like-Minded Group, Israeli Chief Counsel Alan Baker: “In all my years of international

work, I've never seen the NGOs play a more powerful role... They were in on nearly every meeting. They were in on everything."¹⁴

Why Let Global Civil Society In? The Democratic Deficit

As shown above, the influence of global civil society actors on the Statute is undeniable. But why should state representatives be so pleased to be sharing the stage with new actors whose mandate to be part of the negotiations is much less obvious than their own? Should we share their enthusiasm?

According to Adriaan Bos, the Dutch chair of the ICC negotiations until Rome, global civil society involvement "fills in gaps arising from a democratic deficit in the international decision-making process."¹⁵ Although international law-making has not traditionally been a democratic process, there is an increasing sense among national and international diplomats that, as more decisions have moved up to the international level, international decision-making, and international law-making in particular, ought to be (more) democratic.

This idea is related to a more general recognition by political thinkers that, while more states have been converted to parliamentary democracy, the onset of globalization has eroded the substance of democratic participation and choice.¹⁶ The enthusiasm for global civil society and the claim that it makes international decision-making "more democratic" should probably be seen in this context. But does it? This article will assess this claim with respect to the global civil society involvement in the ICC negotiations.

This requires, first of all, a brief enquiry into the meaning of democracy. Its Greek root means simply "rule by the people," but in its modern use, the term usually implies a system of governance whereby "the people" periodically elect representatives, whilst key civil and political

rights are observed. It is difficult to make a direct link between either of these meanings and the contribution of global civil society to international decision-making processes such as the ICC negotiations. In fact, Kenneth Anderson's strong objection to the idea of a global civil society is based precisely on what he believes to be a conflation between the role of elected representatives at the national level and NGOs at the global level. "But who elected the international NGOs?" he asks, and goes on to observe that most NGOs are 'not very often connected, in any direct way, to masses of "people."' ¹⁷

This is true, but neither, many democratic theorists would point out, are political parties. Since the 1970s, there has been a severe drop in the number of party members, in the attendance at party conferences, and in voter turn-out in most established democracies. Like the electorate at large, democratic theorists became increasingly disillusioned with representative democracy, calling it "thin" or "procedural" democracy. While by and large continuing to advocate representation and civil and political rights as minimum conditions for democracy, they explored forms that would make citizens participate more actively in politics. They referred to such forms as strong, ¹⁸ participatory ¹⁹ and especially, as deliberative ²⁰ democracy.

It is on such notions of democracy, rather than on classic representation, that the argument is built that global civil society democratizes international decision-making, or "global governance," as its proponents tend to call it. They agree that such processes are not democratic in their present form, but contend that global civil society participation makes them more so than they would otherwise be. ²¹ Global civil society has been conceptualized as a "functional equivalent" ²² or "alternative mechanism" ²³ to the multi-party representational system, for democratizing global governance.

The next section will examine some of these supposed democratic functions of global civil society in the light of this study on the ICC Statute: contributions to transparency, equality and deliberation. The subsequent section will revisit the remaining problem areas, representation and participation, again in the light of the ICC negotiations, reassess to what extent global civil society does democratize international decision-making processes, and also make some recommendations regarding increased participation. The fourth section will suggest that the tortured democracy question is not the only justification for global civil society involvement in international fora. It will discuss the much overlooked and by no means unproblematic “ethical contribution” of global civil society and offer a qualified defence of more international law, with more global civil society participation, on this basis.

Democratizing Contributions

Transparency or openness is a necessary condition of all forms of democracy. Whether in direct or representative democracy, the process of deliberation and the eventual vote must take place openly. Even in experimental forms of democratic procedure that eschew the vote, public discussion is highly valued. Karl Popper considered “openness” the prime instrument to keep any form of government from usurping too much power.²⁴ More recently, Gutmann and Thompson²⁵ have drawn on such different philosophers as Jeremy Bentham and Immanuel Kant to construct publicity as a necessary condition for deliberative democracy, while also insisting (in line with human rights law) that certain forms of regulated secrecy are necessary in a democratic society.

Yet in international negotiations, secrecy has traditionally been the norm. All that became available to the public was the final product—sometimes, there were also secret treaties such as the infamous Molotov-Von Ribbentrop pact. This changed somewhat with the advent of

superpower summits and international UN conferences after the Second World War. Now, citizens would be informed via the media that negotiations were proceeding, politicians might make statements and journalists would speculate about the outcome.

Nonetheless, the substance of the negotiations would still take place behind closed doors. Global civil society coalitions have really changed this, and the Coalition for an International Criminal Court (CICC) is a prime example. Its working methods included forming twelve shadow teams to monitor negotiations on different parts of the Statute, debriefing friendly state delegates after closed meetings, and keeping “virtual vote” tallies on crucial issues. These mechanisms made official decision-making process more transparent: for its members, for journalists, and, through them, for a wider interested audience and even for state delegates. The entire texts of interim proposals, with an analysis, were reprinted in one of the special conference newspapers. Information was also sent to thousands of national activists and interested observers, by the Coalition itself, by some of its member NGOs, and by the press teams of two special news bulletins devoted to the conference’s proceedings.²⁶ The CICC took the potential for making international negotiations transparent to its limits, and in turn used this publicity as leverage on states: “Show the governments in Rome that the world is watching,” wrote Rik Panganiban, editor of the Coalition’s publication, four weeks into the Rome conference, “Email to us in Rome your messages for your government or for all governments, and we will try to publish as many as we can in the CICC Monitor.”²⁷

The fact that the final conference took place at a UN building in Rome with which most delegates were unfamiliar, the building of the Food and Agricultural Organization, contributed to this transparency, making it very difficult for them to slink off into remote rooms for secret meetings.²⁸

More importantly perhaps, many state representatives found these channels of publicity useful, to state their position or vent their frustration with other states or with the process of negotiation, in particular when they believed that public opinion might be on their side. An article in *On the Record*, for instance, records in detail on the proceedings of a closed meeting, where “according to one report,” twenty-seven of the twenty-nine delegates objected to the British chair’s proposal, “a growing number of delegates” felt that Britain was a stalking horse for the US, and one “Scandinavian delegate” is directly quoted venting frustration with the British position.²⁹ As the conference wore on, state delegates began to complain in the media about the lack of transparency of the process itself.³⁰ This is an interesting development, because state delegates thus addressed the interested wider public with an appeal to a norm of transparency which has no tradition in international negotiations.

Moreover, there seems to be a relation between the extent of transparency of negotiations and their final outcome. In the two instances in which final decisions were made in great secrecy, the outcomes were unsatisfactory to civil society actors: this applies to the jurisdiction regime as well as the omission of an explicit reference to biological weapons.³¹

The first of these cases is particularly interesting, because it is one of the very few instances in the ICC negotiations where the express preferences of the majority of states were overridden in favor of the preferences of a very few “powerful” states. The few Like-Minded states who were in on this secretive negotiation process chose not to go the route of publicity and appeal to public opinion, and suffered defeat. After the fact, a German delegate did write an article exposing exactly what had happened and defending his government’s record to the readers of the *European Journal of Crime, Criminal Law and Criminal Justice*.³²

Before and after the five frenetic weeks of the Rome conference, the public education aspect played a larger role than publicising the exact proceedings in the negotiations: explaining plainly in local languages what the International Criminal Court was, and why it should matter, for the benefit of a wider audience. In this respect, the ICC case typifies a more general strength of global civil society: with respect to rather esoteric topics like global warming, third world debt, or intellectual property rights, it opens up more general debates, in which active citizens can inform themselves and take part.

Like in national democracies, certain discussions and negotiations will continue to take place behind closed doors, but global civil society has been shown to play an important role in shifting the balance much further towards openness as the default setting in international negotiations.

Levelling the Playing Field

Another key condition of democracy, representative or deliberative, is equality. According to David Beetham, “a system of collective decision-making can be said to be democratic to the extent that it is subject to control by all members of the relevant association, or all those under its authority, considered as equals.”³³ Formally, there is such equality between the members of the association called the United Nations, at least in its General Assembly and Economic and Social Council if not in the Security Council. The ICC negotiations followed the General Assembly model in this respect: all states had an equal right to speak, and an equal vote. However, in practice some states are of course more equal than others. This is not just a question of perceived power, but also of capacity to be involved in multiple complex negotiations. Regardless whether one believes that citizens should somehow be able to have a direct involvement in global

processed that affect them, levelling the playing field between the formally equal players, the states, would contribute to democratizing international decision-making. Global civil society does at times play such a role. Most eye-catching has probably been the expert advice, and publicity, given to developing countries in the negotiations of the World Trade Organization in recent years.³⁴

In the ICC negotiations, civil society made various contributions to empowering smaller and poorer states in the process, and giving them a more equal footing with traditionally powerful states. The documents produced by individuals and NGOs helped to educate them with respect to the issues involved. The provision of interns and legal experts swelled their delegations in quality and quantity. The monitoring, by the NGOs, of both public and, as far as possible, secret, negotiations, both in terms of the substance of the debate and the numbers in favor of certain positions, made the process more transparent and easier to follow for such states.

But its method of recording the “virtual vote,”³⁵ was perhaps the most important, as it focused attention on absolute numbers of states in favor of particular positions. Without this effort, the fact that, for instance, more than eighty percent of the states favored an independent prosecutor would simply have gone unrecorded. Now, it became a topic of debate and a counterweight to the inevitable spotlight on the position of “important” states such as the five permanent members of the Security Council. Thus, the formal equality of states was given a little more substance by at least polling and publicising each state’s views, in circumstances where actual voting was avoided except at the very end.

The idea of deliberative democracy is that proposals can be debated on their merits through rational arguments rather than solely on the basis of representation of interests. This

aspect of democracy is therefore related to the ethical contribution discussed below. There are two components to this question: whether global civil society made the official state debates more deliberative and less focused on narrow interests, and whether there was a form of deliberative decision-making going on within global civil society. On the first count, the answer is clearly “yes.” As discussed in chapter two, numerous conferences, seminars and unofficial retreats were organized, not just all over Europe, but in Trinidad, in India, in Sierra Leone, in South Africa etc. There is no doubt that the numerous conferences and seminars, the Sicilian retreats, academic articles, and NGO position papers contributed to a global, albeit specialist, debate on the merits of the international criminal court, which informed and influenced the ultimate decision-making by state delegates.

Moreover, deliberative democracy entails giving and demanding reasons for each position, reasons that would at least theoretically be capable of swaying other participants in the debate. It also means participants should to some extent be prepared to be swayed by arguments that appear “reasonable.” This disposition on the part of states, fostered by the constant discussions with civil society representatives, clearly played a role in the negotiations over the independent prosecutor. When states expressed reasonable fears that the independent prosecutor could be overzealous if unrestrained, a reasonable proposal was made that all prosecutions should be subject to the permission of a pre-trial chamber. When states expressed reasonable concern that the Security Council’s mandate on peace and security would be hindered by prosecutions that might, for instance, upset peace negotiations, a reasonable proposal was made to give the Security Council an “inverted veto.” In the atmosphere created among other things by the presence of the former prosecutors Goldstone and Arbour, assertions of naked interest seemed simply inappropriate, and the United States in particular did make every effort to argue

its position. The “reasonable solutions” to meet ostensible objections therefore made it difficult to continue to object to the independent prosecutor—and in fact the US has based subsequent objections to the Court on the jurisdiction regime, not the prosecutor.

On the second count, of internal deliberation, there is rather more doubt. The NGO Coalition for an ICC was inclusive and tolerant in principle and in practice. A very wide range of groups who supported the broad goal of a “just, effective and independent court” joined the Coalition. This included even the small minority of “family-oriented” groups who were opposed to the aims of the Women’s Caucus, unless it became clear that they were generally hostile to the idea of a strong Court. They were met with irritation by most NGOs and many state delegates, but tolerated, accredited, and given access to the same facilities as others.³⁶

However, it must also be said that the Coalition did not favor extensive internal deliberation. As Burroughs and Cabasso write,

There was no thorough debate, still less any formal collective decision-making, among all participating NGOs. Partly this was for practical reasons, because of the number of NGOs, the cumbersome internal decision-making procedures of some NGOs, and the onslaught of events, and partly because it was deemed too divisive to get into controversial matters.³⁷ Partly, too, the NGO Coalition lacked the kind of culture of consensus reflecting commitments to social transformation, non-violence, and representation of popular demands.

The Coalition emphasised pluralism rather than internal democracy and chose to take few common positions. The Steering Committee, and the Coordinator in particular, had good reasons for such an approach, having “experienced the break-downs and break-ups of NGO steering committees” all too often, and it was a matter of “amazing grace” that this Coalition survived such pressures.³⁸ However, the few common positions taken, and even informal understandings about the priorities, were crucial, as leading state delegates often channelled their consultation with NGOs through the Coalition.³⁹

These positions, or non-positions, did not come about through genuine deliberation among all or most members of the Coalition, and it must be said that, in terms of internal deliberative democracy, the Coalition was wanting. Unlike Burroughs and Cabasso, I would argue this was not caused by a lack of a “culture of consensus,” but, on the contrary by an unspoken assumption that there was, and ought to be, a consensus.

There certainly appears to have been such an assumption on the part of some government officials. As the Dutch chair put it: “I was delighted with the way the Coalition succeeded in making all the NGO interests into a coherent unity, as I saw the importance of involving them, but I could not consult with every individual NGO.”⁴⁰ In its recent report, the Panel of Eminent Persons on United Nations-Civil Society Relations, expresses a similar desire for neat amalgamation of civil society views through “disciplined networking and peer review processes of the constituencies.”⁴¹

Alison Van Rooy goes even further in her recent book, suggesting—although not ultimately defending—the idea that a united front not only makes civil society campaigning more effective, but that a lack of it detracts from the moral authority of civil society: “[t]he rule here suggests that if activists cannot agree on a united position, there are fewer reasons to listen to what they have to say.”⁴²

But is such unity really the most desirable in terms of fostering deliberation? As Iris Marion Young puts it, deliberative democracy should not be “a comfortable place of conversation among those who share language, assumptions, and ways of looking at issues.”⁴³ On the contrary, “[c]onfrontation with different perspectives, interests, and cultural meanings teaches individuals the partiality of their own, and reveals to them their own experience as perspectival” and “[w]hile not abandoning their own perspectives, people who listen across

differences come to understand something about the ways that proposals and policies affect others differently situated.”⁴⁴

While precisely playing that role of bringing the experience of “others” to the attention of state representatives, the CICC did perhaps too much resemble a “comfortable place of conversation,” and fell into the trap of providing a convenient single “civil society perspective” to the UN and state officials, instead of reflecting a sometimes confusing, sometimes confrontational plurality of voices. While in the case of the ICC this does not seem to have detracted at all from its effectiveness, such lack of space and time for open and free deliberation can have consequences for the legitimacy as well as the creativity of global civil society, and hence for its influence, in the long term.

On the other hand, the confrontation between the women’s groups and pro-family groups over “forced pregnancy”⁴⁵ does not meet the requirements of “deliberative democracy” either, as listening to one another, and engaging in a rational set of arguments and counter-arguments, is also one of the characteristics of the idea of deliberation, and there was certainly no such listening process between these two types of groups. Nonetheless, one could argue that the presence of both perspectives contributed to the deliberative process of the negotiations as a whole. Certainly the resolution of the fraught issues of forced pregnancy and the definition of gender can be considered as school-book examples of a beneficial compromise outcome of a deliberative process.⁴⁶

If the UN is serious about the role of global civil society as fostering real deliberative processes, it should actively look for a *plurality* of civil society views, including starkly opposing ones, instead of trying to weed out such controversy before allowing civil society entry into its chambers. The ICC case has shown that networks are a powerful tool in strengthening the

potential influence of global civil society on state negotiations. However, it has also shown that they have a tendency to homogenize views, neglect minority views and of course exclude views that oppose their founding mission. Therefore, a heavy focus on networks is not conducive to the role of global civil society as fostering reasoned debate between different views.

This section has shown that global civil society can, as it has in the case of the ICC, contribute to the transparency of international negotiation processes, to greater equality of the participant states, and to deliberative debate. But is this enough to conclude that global civil society democratizes processes of international decision-making? The next section examines two further key areas that are considerably more problematic: representation and participation.

Voice not Vote: Representation and Participation

Representative democracy was invented because the decision-making constituencies, the *demos*, of nation-states were too large and too dispersed to allow every individual to take part in debates and voting. It is therefore natural that, when thinking about the possibility of a global democracy, or democratizing existing global institutions, representative mechanisms of democracy spring to mind. Some would argue that the United Nations General Assembly already functions as such: now that three quarters of the world's states are at least formally democratic, one could argue that citizens elect their governments, and the governments represent them in the United Nations.

However, there are various problems with this line of thinking: governments, unlike parliaments, are only formed out of the winning party or parties. The General Assembly is therefore not comparable to national parliaments, because only the national "winners" are represented. Moreover, complex international issues are not usually an important element in election campaigns. The ICC was not a major issue in any national election campaign. The fact

that it even appeared in the Labour party manifesto of the United Kingdom in 1997 was an anomaly. We still elect national governments primarily to govern us, not to represent us at the international level. So, as is often remarked, the United Nations do not, in fact, represent “We the people,” but “We the governments.”

So, can global civil society represent “We the peoples” instead? The Panel on UN Civil Society Relations certainly seems to suggest this by calling its report “We the Peoples: the United Nations, Civil Society and Global Governance.”⁴⁷ But how does this representation work? Some organizations have a mass membership. Amnesty International is considered a very large NGO, with more than 1.8 million members from 150 countries,⁴⁸ but this is nothing compared to the 148 million combined membership of the ICFTU family of trade unions.⁴⁹ Other influential organizations such as Greenpeace, Oxfam or the World Wide Fund for Nature do not have members, just financial “supporters”—although Greenpeace does claim to speak for its 2.8 million supporters.⁵⁰ As Van Rooy has pointed out, the geographical spread and depth of commitment of members differ vastly between organizations, as do procedures for internal democracy.⁵¹ There are also very small organizations, and in the negotiations on the International Criminal Court as elsewhere, there were many civil society actors who did not claim to represent anyone but themselves.

It becomes obvious very quickly that conceptualizing global civil society as a global equivalent of political parties, organising the global electorate into voting blocks whom they represent in international negotiations, is inaccurate and misleading. Having a large membership base may be a source of legitimacy and influence to particular organizations, but democratic representation in the traditional sense cannot be considered a functioning attribute of global civil society.

But are there other forms of representation? And who or what ought to be represented? David Held uses the phrase “overlapping communities of fate” to express the fact that those who are affected by certain decisions are, due to globalization, no longer always found neatly in a single political entity, controlled by a democratic process.⁵² Global civil society can sometimes be a solution to such situations where the decision-making is not where the voting is, through an informal form of representation. One could argue, for instance, that global civil society represented people in developing countries living with HIV/AIDS in its advocacy on the production of generic drugs surrounding the WTO negotiations on intellectual property. In the absence of any other form of representation, this may be helpful to those affected, and can certainly be argued to have been helpful in the example given.

But the fact that there is no agreed form for consulting those who are supposedly represented remains problematic. In the case of the Narmada dam, for instance, it has been argued that there was representation at the international level of those Indian villagers who opposed the dam, but no such representation of those who would benefit from it. But who would constitute the “community of fate” for the ICC negotiations? Who is affected, and should therefore be represented? Negotiation of such general rules of international law may affect all our futures, but it is impossible to pinpoint in advance exactly who will be affected, and how. Representation should therefore be conceptualized in a very different way in these situations. Global civil society can still make claims “on behalf of,” but claims on behalf of future victims of human rights violations, on behalf of the environment, or on behalf of the unborn child, have little or nothing to do with a parliamentarian’s work on behalf of his constituency. On the one hand, consultation mechanisms are not a necessary part of such claims. On the other hand, no formal voting rights can or should be based on it. Global civil society is

not, and should not be, seen as a kind of global parliament. Or as Mike Edwards puts it, civil society is “a voice not a vote.”⁵³

Another way of conceptualizing this is to say that participation, not representation, is the point of global civil society. As the Panel on UN Civil Society Relations puts it: “citizens increasingly act politically by participating directly, through civil society mechanisms, in policy debates that particularly interest them. This constitutes a broadening from representative to participatory democracy.”⁵⁴ But whose voices are, and should be, heard under the banner of global civil society? Who gets to participate?

Some actors, it should be said, do not wish to participate, or at least not on the invitation and according to the rules of the decision-makers. As Iris Marion Young puts it, they typically “make public noise outside while deliberation is supposedly taking place on the inside,” although sometimes they “invade the houses of deliberation and disrupt their business.”⁵⁵ The ICC negotiations saw a few such global civil society actors, such as the anti-capitalist Zapatista solidarity group Ya Basta, which demanded the indictment of Mexican president Zedillo,⁵⁶ and the Mothers of the Plaza de Mayo, who disrupted the speech of the Argentine Justice Minister.⁵⁷

In fact the differences between the Madres de la Plaza de Mayo and the Abuelas (grandmothers) de la Plaza de Mayo, both present at the ICC negotiations in Rome, typify the differences between “outsider” and “insider” activism. The Abuelas go through the courts in their efforts to find the children of their disappeared children and see the perpetrators punished. Through their efforts, Argentinean junta leader Jorge Videla was re-imprisoned in 1997.⁵⁸ Their president, Estela Barnes de Carlotto, came to the ICC negotiation in order to have forced disappearances included in the Statute as a crime against humanity.⁵⁹ The Madres “think that accepting financial compensation and exhumation of bodies are a ‘betrayal’ for their children—

because this, in a legal sense, stops what had been an ongoing crime.”⁶⁰ While there was some debate in the ICC negotiations on recognising past disappearances as an ongoing crime, the Madres did not have any faith in the negotiations and preferred to disrupt them instead.

But as Young points out, such outsiders do in fact “aim to communicate specific ideas to a wide public.”⁶¹ In this particular case, they attracted media attention to what they considered as the inadequacy of the ICC negotiations, which accepted the participation of the—in their eyes illegitimate—Argentinean and Mexican governments, and would not consider past disappearances as part of its agenda. One could argue that such actors do in fact participate in the process, if only from the outside and on their own terms.

Another group that was largely absent from the civil society scene were those conservatives or sovereignists who are sceptical and suspicious of international institutions such as the International Criminal Court. Undoubtedly, there is also such a constituency in civil society, in the United States but also elsewhere. But it did not mobilize to prevent the establishment of the Court—or rather it did not do so at the site of negotiations. The only manifestation of such groups was in relation to “gender clauses,” but it is clear from the documents, websites and newsletters of these groups that their misgivings about the Court went beyond gender alone. The subsequent “war on the Court” by the Bush administration, which also formed part of the 2004 re-election campaign, has made it clear that such views are not irrelevant, however.

The United Nations and the civil society groups themselves should not attempt to exclude such “nasty views” from their deliberations. On the contrary, procedures to invite and manage different and even opposing perspectives should be improved. This is a requirement for having serious deliberation, it is necessary in order to more closely approach the ideal of free and equal

participation, and finally it should in fact be considered as a victory for the United Nations and for multilateralism if such groups do devote energy to participating in its debates, rather than fighting the organization from the outside.

Thus far, I have discussed groups and individuals who were either just outside the gates, or entirely absent, by choice. But what of those who cannot participate? There was one indication—although accounts differ—that an NGO briefing involving a Chinese pediatrician and the French parents of two child AIDS victims was blocked by China and France.⁶² Such deliberate blockings, which were particularly characteristic of the 1995 Beijing Conference on Women, have become rarer, as the furore they cause tends to result in negative publicity for the state, and more publicity for the civil society organization and its cause than they might otherwise receive. Nonetheless, states still have the power to block accreditation to the UN's Economic and Social Council. During the Cold War, states would routinely deny accreditation to organizations they labelled either "communist" or "imperialist." While such practices receded in the 1990s, today there is a new label: "terrorist." Giving the accreditation process over to one of the civil society actors themselves, as was done in the ICC case, is not the solution. But neither is leaving it in the hands of states conducive to wide participation. The recommendation of the UN Panel, to give the UN secretariat a greater role in deciding on accreditation, is to be welcomed, although it is on the conservative side, still allowing for state vetoes, although not by a single state.

Beyond deliberate obstruction by states, there is a wider problem with participation. The UN Panel describes participatory democracy as a process in which "anyone can enter the debates that most interest them, through advocacy, protest, and in other ways."⁶³ But a few pages later it acknowledges that there are practical constraints: "if the United Nations brought everyone

relevant into each debate, it would have endless meetings without conclusion.”⁶⁴ As Ricardo Blaug puts it wryly, “Whether due to there being simply too many of us, to the excessive complexity and interdependence of the problems we face, to a perceived inefficiency of deliberation, or to a perceived lack of ability and motivation on the part of the *demos*, democratic theorists since Plato have taught us that the people, while being sovereign, require structures that limit their participation.”⁶⁵

Not only is participation limited, it is typically limited in ways that confirm existing power imbalances: “under conditions of structural inequality, normal processes of deliberation often in practice restrict access to agents with greater resources, knowledge, or connections to those with greater control over the forum.”⁶⁶ Even at the very local level, Young sums up a number of barriers to participation by “anyone with an interest:” “Even when a series of public hearings are announced for an issue, people who might wish to speak at them need to know about them, be able to arrange their work and child care schedule to be able to attend, be able to get to them, and have enough understanding of the hearing process to participate. Each of these abilities is unevenly present among members of a society.”⁶⁷ These constraints are of course multiplied at the global level.

Discussions of these inequalities often focus rather crudely on geographical representation. What is interesting about the ICC negotiations is that in terms of this issue of “Southern participation,” global civil society performed rather well. There were substantial numbers of African and Latin American groups, although fewer Asian ones and very few from the Middle East. Various “causes” or “issue areas,” sometimes at odds with each other, were represented, although human rights concerns dominated.⁶⁸

However, in other ways the group of global civil society participants was very homogeneous. Almost without exception, they belonged to an English-speaking, university-educated, computer-literate middle class. Perhaps this is inevitable. To a lesser extent, this is also true of national parliamentarians. But it does not reflect the diversity of the world population, nor does it necessarily reflect the profile of future victims of war crimes, crimes against humanity or genocide.

In fact, there appear to have been surprisingly few victims of past human rights violations involved in the negotiations. Barnes de Carlotto, the Abuela described above, was one of them, as was Raquel Edralin-Tigalo, an anti-torture activist from the Philippines who had herself been subject to torture.⁶⁹ Another participant with personal knowledge of one of the issues at stake was Robert Green, a former naval commander who had flown anti-submarine helicopters which carried nuclear weapons, and who had later become an anti-nuclear activist.⁷⁰ Others had worked closely with victims, but most of the legal experts present at the negotiations had primarily theoretical knowledge of the crimes at stake. It is of course not necessary to have suffered human rights violations, or to have insider knowledge of nuclear devastation, to have a viewpoint about the ICC, based for instance on legal expertise or on moral conviction. But if participation in global processes is necessarily selective on practical grounds, then a particular effort should be made, particularly within global civil society, but also by global institutions, to include the voices of “experiential experts:” on human rights violations, on HIV/AIDS, or on child soldiers, and not just technical ones. In other fora, such as trade negotiations, non-governmental organizations and networks have engaged in “accompaniment,” for instance of small farmers who would be affected by the negotiations.⁷¹ Such practices could aid inclusion of “experiential

experts,” provided they offer real participation, and not a symbolic trotting out of “the victim” to support the NGO’s already formed position.

This section has argued that the idea of “participation” as an alternative to representation is limited by exclusion. There are those who exclude themselves, those who are deliberately excluded by states, but the most intractable form of exclusion is that by class, means, education and information. Global institutions and global civil society should be able to do more to include the voices of poorer, less educated people with a clear stake in the negotiations than it did in the ICC case, but in the world as it is, it is very doubtful that such inclusion can ever be much more than symbolic.

Conclusion

On the basis of the ICC case, it can be argued that global civil society greatly contributed to strengthening certain features commonly associated with democratic procedure, in particular transparency, equality and deliberation. Global civil society should not be seen as offering a form of representation of the global *demos*, however, or at least not representation in its traditional form. It could be conceptualized as a form of participation, but in practice this participation is so limited and so uneven that global civil society cannot entirely be considered an adequate “functional equivalent” or “alternative mechanism” to parliamentary democracy, operating at the global level.

Global civil society in its present form cannot be considered a satisfactory substitute for democracy, and there is no reason to believe it will make great strides in that direction. It does contribute to making international decision-making processes more democratic than they were before, but a democratic deficit remains. However, it can be argued that another contribution is

made by global civil society to international decision-making processes, which has received much less attention than the democratizing aspect: that of moral values.

The hundreds of groups and individuals who engaged in the International Criminal Court negotiations, whether they were criminal law experts, pro-family groups or world federalists, all became involved because of their belief in, or concerns about, a particular kind of Court. For some, such as the law students of ELSA, career considerations may have played something of a role. For some NGO professionals, it was “their job” to be there. But their involvement went far beyond that of an ordinary job. Often, they had had to convince their own organizations of the importance of being there. The overriding motivation for being involved was based on ethical convictions.

But what of the state representatives, do they have ethical convictions? There are two classic theories in international relations on foreign policy and ethics. The first, and certainly the most influential until the 1990s, is realism. Based on a particular reading of Machiavelli, or alternatively a transposition of Hobbes’ “war of every man against every man” theory to the international plane,⁷² it teaches that international relations are an anarchical sphere, where each state pursues its national interest and there is no place for ethics. Liberal or idealist theory on the contrary teaches that there is a “society of states,” where rules in the common interest of mankind are constructed, and for the most part, obeyed.⁷³ According to the latter theory, there is a space for “ethics,” or enlightened self-interest, in foreign policy. It also gives more space to the conceptualization of intergovernmental organizations, and sometimes even civil society groups, as independent actors. But neither theory really understands the diplomats themselves as social actors subject to environmental influences (the social constructivist school does).⁷⁴ Whether it is “national interest” or a more cooperative stance, the policies of states are conceptualized as holy

writ, handed down from black-box foreign ministries. State representatives are not to have convictions, ethical or otherwise.

In reality, state representatives do, of course, have value dispositions of their own. Many of the diplomats of the influential Like-Minded Group were ardent supporters of the Court, not just professionally but also personally. Their prolific writing on the ICC⁷⁵ attests to this, as does the fact that four have since been elected as judges to the Court, and others now work in the Prosecutor's Office.⁷⁶

Nor are state positions on something like the International Criminal Court arrived at in isolation from those who negotiate on them. They are gradually formed, informed by inside expertise and outside information, and constantly re-adjusted. The atmosphere of the negotiations can influence the substance of the positions. As discussed above, global civil society transformed that atmosphere in terms of transparency and deliberation. But another aspect of the sustained presence of civil society actors was that they constantly invoked ethical considerations, claims about the needs of humankind. In Rome, their numbers swelled to approximately 450 people, collectively by far the largest delegation at the Rome conference.⁷⁷

International relations theories like realism and idealism do not just seek to explain state behavior—or as I would rather put it, the behavior of state representatives—they also end up informing such behavior. In domestic politics, it is not ethically acceptable for politicians to defend policies simply as being in the self-interest of a particular group: “this policy is good for the small businessmen, or for the Catholic minority, who vote for me.” They need to present such policies as being for the common good: “small businesses will kick-start the national economy,” “Catholic emancipation will make our society more equitable.” The dominance of realist theory made any such arguments for the general interest unnecessary in the international

sphere—it even characterized them as foolish. It legitimized the invocation of a (flexibly definable) “national interest” by diplomats as the sole motivation for this or that position.

Global civil society actors present themselves precisely as the champion of values beyond state interests, working towards a global common good. Having a majority of such actors around is like being accompanied to a brothel by a delegation of priests. Even without any formal status, they constrain behavior and change the terms of debate. Forthright statements that “this is not in our nation’s interest” can still be heard in international negotiations, but they jar in an environment where appeals to reason and to universal justice are increasingly common currency. States are therefore more motivated to frame their proposals in terms of appropriateness and justice in the presence of civil society actors. In some cases, state representatives themselves completely took over the moral high ground that usually belongs to civil society actors: the passionate appeals of Bosnian and Burundi delegates for various forms of gender justice, based on experiences in their own countries, in every way resembled activist advocacy.

If it is accepted that global civil society moves states towards appreciating, or at least appearing to appreciate, “ethical” or “common good” arguments over national interest arguments in international negotiations, the question remains which ethical projects make it to those fora, and get taken up. In the ICC negotiations, while there was some open (women verses pro-family groups) as well as some muted contestation (around weapons of mass destruction), there was clearly a dominant civil society project: to prise away from the exclusive domain of states the power to punish perpetrators of genocide, war crimes, and crimes against humanity. Those who do not like the project, will point to the democratic deficit of global civil society: the lack of representation and limits to participation. They are likely to point back to national democracy as the solution.

The existence of a democratic deficit at the global level, and the fact that global civil society cannot entirely fill it, should not be denied. But the number of victims made by human rights violating states in the last century is staggering. Some of these governments were flawed democracies, too. This is why it is worth giving up some national democratic supremacy in exchange for international law, firstly to frame norms on human rights, disarmament and the environment, and secondly to actually enforce them. And global civil society should be there to help make these laws and get them enforced, to strengthen transparency, equality, and deliberation in international decision-making processes, and to help inch states from narrow interests to global common interests. Those who think that this is not in fact in the interest of humanity, should come and join the debate with their own ethical project—become part of global civil society.

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